Ong Gim Huat v Toh Suan Lin Amy

HIGH COURT (PENANG) — DIVORCE PETITION NO 33–245–89
MOHAMED DZAIDDIN J
31 JANUARY 1992

Civil Procedure *— Judgment on admission of facts — Whether applicable to matrimonial proceedings — Rules of the High Court 1980 O 27 r 3 — Divorce and Matrimonial Proceedings Rules 1980 r 3(1)*

Family Law *— Divorce — Irretrievable breakdown of marriage — Admission of fact by respondent wife in answer to petition that marriage irretrievably broken down but for different reasons — Whether petitioner entitled to decree of divorce on ground of wife's admission — Whether admission of fact clear — Divorce and Matrimonial Proceedings Rules 1980 r 3(1) — Rules of the High Court 1980 O 27 r 3*

In this contested petition for divorce, the petitioner husband alleged that the marriage had irretrievably broken down. He also alleged that the respondent wife had deserted him for a continuous period of at least two years preceding the presentation of the petition. The respondent, in the answer to the petition, admitted that her marriage with the petitioner had irretrievably broken down, but denied that it was on the ground that she had deserted him for a continuous period of two years before the presentation of the petition. She averred that in spite of working in Kuala Lumpur in March 1987, she continued to return to Penang on the weekends to be with the petitioner and their son. According to her, their marriage had irretrievably broken down by reason of matters set out in the answer, of which the principal grounds appeared to be the petitioner's intolerable conduct and constructive desertion.

The petitioner husband then applied by way of notice of motion for a decree of divorce on the ground of the wife's admission in the answer to the petition that their marriage had irretrievably broken down. His counsel relied on r 3(1) of the Divorce and Matrimonial Proceedings Rules 1980 ('the Rules') which states that subject to the Rules and to any written law, the Rules of the High Court 1980 ('the RHC') shall apply with necessary modifications to the commencement of matrimonial proceedings in, and to the practice and procedure in matrimonial proceedings pending in the High Court in order to invoke O 27 r 3 of the RHC (judgment on admission of facts).

Held, dismissing the application:

(1) The operative words in r 3(1) of the Rules are 'subject to these Rules and to any written law'. The Rules go further to state that the RHC shall apply with necessary modifications to the commencement and to the practice and procedure in matrimonial proceedings in and pending in the sessions and High Courts. The Rules contain a complete set of rules and procedures in matrimonial proceedings under the Act. Where it is intended for the Rules

to apply or incorporate the procedure under the RHC, the Rules specifically provide for it. Under the circumstances, the use of interlocutory procedure of obtaining judgment on admissions under O 27 r 3 of the RHC in the divorce petition was misconceived.

(2) Admissions of fact may be express or implied but they must be clear. Having considered the facts and rebuttals in the context of ss 53 and 54(1) (proof of breakdown) of the Law Reform (Marriage and Divorce) Act 1976, the court concluded that the respondent's admission was not clear such that it would enable the court to invoke O 27 r 3 of the RHC. The jurisdiction of the court under this rule is discretionary. It was beyond doubt that the respondent admitted that the marriage had irretrievably broken down but for different reasons. Further, under s 53(2) of the Act, the court has to inquire into the facts and circumstances alleged as causing the breakdown and in doing so, it has to have regard to any of the facts mentioned in s 54(1). A trial was necessary for the court to inquire into the alleged fact for causing the breakdown before making a decree for its dissolution.

Per curiam: This application is quite irregular because it was commenced by motion. An application for an order under O 27 r 3 of the RHC may only be made by summons.

[Bahasa Malaysia summary

Di dalam petisyen untuk perceraian yang dipersoalkan ini, pempetisyen si suami mengatakan bahawa perkahwinan itu retak sehingga tidak dapat dipulihkan. Beliau juga mengatakan bahawa penentang si isteri telah meninggalkan langsung beliau untuk masa berterusan selama sekurang-kurangnya dua tahun sebelum petisyen itu dikemukakan. Penentang, dalam jawapan kepada petisyen itu mengaku bahawa perkahwinannya dengan pempetisyen retak sehingga tidak dapat dipulihkan tetapi menafikan bahawa ia berlaku atas alasan bahawa beliau telah meninggalkan langsung pempetisyen untuk masa berterusan selama dua tahun sebelum petisyen itu dikemukakan. Penentang menegaskan bahawa walaupun beliau bekerja di Kuala Lumpur pada Mac 1987, beliau terus kembali ke Pulau Pinang pada hujung minggu untuk bersama pempetisyen dan anak lelaki mereka. Mengikut penentang, perkahwinan mereka telah retak sehingga tidak boleh dipulihkan oleh kerana perkara-perkara yang dinyatakan dalam jawapan itu, yang mana alasan-alasan utama nampaknya adalah kelakuan pempetisyen yang tidak boleh ditahan lagi dan peninggalan langsung konstruktif pempetisyen.

Pempetisyen si suami kemudian memohon melalui notis usul untuk suatu dekri perceraian atas alasan pengakuan si isteri dalam jawapan kepada petisyen itu bahawa perkahwinan mereka retak sehingga tidak boleh dipulihkan. Peguamnya bergantung pada k 3(1) Kaedah-Kaedah Prosiding Perceraian dan Perkahwinan 1980 ('Kaedah itu') yang mengatakan bahawa tertakluk kepada Kaedah itu dan kepada sebarang

undang-undang bertulis, Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') akan terpakai dengan pengubahsuaian yang perlu pada permulaan prosiding hal-ehwal suami isteri dan pada amalan dan prosedur dalam prosiding hal-ehwal suami isteri yang belum selesai di Mahkamah Tinggi supaya menggunakan A 27 k 3 KMT (penghakiman atas pengakuan fakta-fakta).

Diputuskan, menolak permohonan itu:

(1) Perkataan-perkataan yang amat tepat dalam k 3(1) Kaedah itu adalah 'subject to these Rules and to any written law'. Kaedah itu selanjutnya mengatakan bahawa KMT akan terpakai dengan pengubahsuaian yang perlu pada permulaan dan pada amalan dan prosedur dalam prosiding hal-ehwal suami isteri di dan yang belum selesai di mahkamah sesyen dan Mahkamah Tinggi. Kaedah itu mengandungi suatu set lengkap kaedah-kaedah dan prosedur dalam prosiding hal-ehwal suami isteri di bawah Akta itu. Di mana Kaedah itu dimaksudkan untuk memakai atau menggabungkan prosedur di bawah KMT, Kaedah itu membenarkannya secara khusus. Dalam keadaan begitu, penggunaan prosedur interlokutori untuk memperoleh penghakiman atas pengakuan di bawah A 27 k 3 KMT dalam petisyen perceraian itu salah rancang.

(2) Pengakuan-pengakuan fakta boleh jadi ternyata atau tersirat tetapi mesti jelas. Setelah menimbangkan fakta-fakta dan pematahan-pematahan dalam konteks ss 53 dan 54(1) (bukti keretakan) Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976, mahkamah membuat kesimpulan bahawa pengakuan penentang tidak begitu jelas sehingga ia membolehkan mahkamah menggunakan A 27 k 3 KMT. Bidang kuasa mahkamah di bawah kaedah ini adalah mengikut budi bicara. Tidak diragui bahawa penentang mengaku yang perkahwinan itu retak sehingga tidak dapat dipulihkan tetapi kerana sebab-sebab berlainan. Selanjutnya, di bawah s 53(2) Akta itu, mahkamah harus menyiasat fakta-fakta dan keadaan-keadaan yang dikatakan menyebabkan keretakan itu dan dalam membuat demikian, ia harus mengambil berat terhadap sebarang fakta-fakta yang disebutkan dalam s 54(1). Suatu perbicaraan adalah perlu untuk mahkamah menyiasat fakta yang dikatakan menyebabkan keretakan itu sebelum membuat dekri pembubaran.

Per curiam: Permohonan ini adalah benar-benar luar aturan kerana ia telah dimulakan melalui usul. Suatu permohonan untuk perintah di bawah A 27 k 3 KMT hanya boleh dibuat melalui saman.]

Case referred to

1 *Grenfell v Grenfell* [1978] 1 All ER 561 (not folld)

Legislation referred to

Law Reform (Marriage and Divorce) Act 1976 ss 47, 53(2), 54(1), Pt VI

Divorce and Matrimonial Proceedings Rules 1980 rr 3(1), 24, 25
Rules of the High Court 1980 O 24 r 12, O 26 r 1, O 27 r 3

K Balasundaram (*Balasundaram & Co*) for the petitioner.
Kan Weng Hin (*CH Liew & Co*) for the respondent.

Cur Adv Vult

Mohamed Dzaiddin J: In this contested petition for divorce, the petitioning husband applied by way of notice of motion for a decree of divorce on the ground of the wife's admission in the answer to the petition that their marriage had irretrievably broken down. Alternatively, the petitioner prayed for an order that the issue whether there had been a continuous period of two years' separation immediately preceding the presentation of this petition be tried as a preliminary issue.

On the procedure, Encik Balasundaram, counsel for the petitioner, relied on r 3(1) of the Divorce and Matrimonial Proceedings Rules 1980 ('the Rules') which, in so far as it applies to this application, states that subject to the Rules and to any written law, the Rules of the High Court 1980 ('the RHC') shall apply with necessary modifications to the commencement of matrimonial proceedings in, and to the practice and procedure in matrimonial proceedings pending in the High Court. Hence, based on this r 3(1), the petitioner seeks to invoke O 27 r 3 of the RHC (judgment on admission of facts) for this court to pronounce a decree of divorce on the ground of the wife's admission in her answer to the petition. In urging me to entertain this application, counsel drew my attention to s 47 of the Law Reform (Marriage and Divorce) Act 1976 ('the Act') which states that, subject to the provisions contained in Pt VI (ie relating to divorce), the court shall, in all suits and proceedings, act and give relief on principles which in the opinion of the court are as nearly as may be comformable to the principles on which the High Court of Justice in England acts and gives relief in matrimonial proceedings. Counsel then relied on the English Court of Appeal decision in *Grenfell v Grenfell*.[1]

In reply, Encik Kan submitted that this application was misconceived because the Rules are complete and make no provision for this type of application. Moreover, r 3(1) only applies where the Rules themselves are silent.

Without going into the merit of the petitioner's application, at this stage, with respect to Encik Balasundaram, I have to agree with Encik Kan that procedurally, this application is misconceived.

The operative words in r 3(1) are 'subject to these Rules and to any written law'. The Rules go further to state that the Rules of the High Court shall apply with necessary modifications to the commencement and to the practice and procedure in matrimonial proceedings in and pending in the sessions courts and the High Courts. In my opinion, the Rules contain a complete set of rules and procedures in matrimonial proceedings under the Act. Where it is intended for the Rules to apply or incorporate the procedure under the Rules of the High Court, the Rules specifically provided for it. For instance, see r 24 and r 25 which state that O 24 r 12 of the RHC (discovery and inspection of documents) and O 26 r 1 of the RHC (discov-

ery by interrogatories) shall apply to a defended cause began by petition. Under the circumstances, I form the view that the use of interlocutory procedure of obtaining judgment on admissions under O 27 r 3 of the RHC in the divorce petition is misconceived.

In passing, I should also point out that this application is quite irregular because it was commenced by motion. An application for an order under O 27 r 3 of the RHC may only be made by summons.

Assuming that I can entertain the petitioner's application for judgment on the respondent's admission in the answer, the next thing I have to do is to examine the pleadings and see if the alleged admissions of fact are clear and that they satisfy the requirements of s 53(2) of the Act. The 1 *Supreme Court Practice 1991* at p 488 under 'Admissions of fact' says that such admission may be express or implied but they must be clear. The petitioner's ground for divorce is clearly stated in paras 9 and 10 of the petition. Under para 9, it was alleged that the marriage had irretrievably broken down. By para 10, the petitioner alleged that the respondent had deserted the petitioner for a continuous period of at least two (2) years preceding the presentation of the petition. The respondent, in the answer to the petition dated 6 April 1990, admitted in para 1 several paragraphs of the petition including para 9. Paragraph 10 was categorically denied. Needless to say, she admitted her marriage with the petitioner had irretrievably broken down, but denied that it was on the ground that she had deserted him for a continuous period of two years before the presentation of this petition. In para 4 of the answer, she averred that in spite of working in Kuala Lumpur in March 1987, she continued to return to Penang on the weekends to be with the petitioner and their son. According to para 5, their marriage had irretrievably broken down by reason of matters set out in the ensuing paragraphs, the principal grounds of which appear to be the petitioner's intolerable conduct and constructive desertion.

Considering the above facts and rebuttals in the context of ss 53 and 54(1) (proof of breakdown) of the Act, can it be said that there was a clear admission on the part of the respondent which would enable this court to invoke O 27 r 3 of the RHC? It must be remembered that the jurisdiction of the court under this rule is discretionary. It is beyond doubt that the respondent admitted that the marriage had irretrievably broken down, but for different reasons. Further, under s 53(2) of the Act, the court has to inquire into the facts and circumstances alleged as causing the breakdown and in doing so, it has to have regard to any of the facts mentioned in s 54(1). So, it is my conclusion that the respondent's admission is not clear. A trial is necessary for the court to inquire into the alleged fact for causing the breakdown before making a decree for its dissolution.

Lastly, I pause to say that the principle in *Grenfell v Grenfell*[1] does not apply to this application.

For the above reasons, I dismiss this application with costs. I suggest both parties should go for an early trial.

Application dismissed.

Reported by Neoh Lay Choo